No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations thereunder, authorize an Indian Tribe, with the approval of the Secretary of the Interior (Secretary), to lease tribal lands for mining purposes. The question presented is:

Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's approval of an amendment to an existing mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 263 F.3d 1325. The opinion of the Court of Federal Claims (Pet. App. 31a-79a) is reported at 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2001.[1] A petition for rehearing was denied

[1] The petition incorrectly states (at 1) that the judgment of the court of appeals was entered on August 24, 2001, rather than August 10, 2001 (see Pet. App. 1a). On September 24, 2001, the government filed a request for an extension of time within which to file a petition for rehearing. The court of appeals granted that request on September 25, 2001, and extended the time for filing a petition for rehearing until October 9, 2001. The government filed a petition for rehearing on October 9, 2001.

on November 16, 2001. On February 4, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 15, 2002. The petition for a writ of certiorari was filed on March 15, 2002, and was granted on June 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a, states:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505—are set forth in the petition appendix (at 86a).

STATEMENT

This case concerns the potential liability of the United States in money damages for alleged breach of trust in connection with the government's approval under the Indian Mineral Leasing Act of 1938 (IMLA) of amendments to a mineral lease agreed to by an Indian Tribe and a private lessee.

1. The United States, through the Secretary of the Interior (Secretary), regulates certain aspects of

mineral leasing on Indian tribal lands pursuant to the IMLA, 25 U.S.C. 396a-396g. The IMLA authorizes an Indian Tribe, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes for a term not to exceed ten years and as long thereafter as minerals are produced in paying quantities. 25 U.S.C. 396a. The IMLA also provides for the Secretary to promulgate rules and regulations governing mineral "operations," 25 U.S.C. 396d, and to authorize other officials in the Bureau of Indian Affairs (BIA) to approve Indian mineral leases, 25 U.S.C. 396e.

The Secretary has promulgated regulations implementing the IMLA. The regulations in effect during the events at issue in this case provided that "Indian tribes * * * may, with the approval of the Secretary * * * or his authorized representative, lease their lands for mining purposes." 25 C.F.R. 211.2 (1985). The regulations established minimum royalty rates for minerals subject to leasing, including, for coal, "not less than 10 cents per ton of 2,000 pounds." 25 C.F.R. 211.15(c) (1985).[2] The regulations provided that an annual rental payment of not less than $1 per acre was required. 25 C.F.R. 211.14(a) (1985). And the regulations provided that lessees could not assign or transfer a lease without the Secretary's approval, 25 C.F.R. 211.26 (1985), and established various other requirements concerning mineral leases.

2. The Navajo Nation, a federally recognized Indian Tribe, occupies the largest Indian reservation in the

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[2] In 1996, the minimum royalty rate on new leases for coal was increased to "12 1/2 percent of the value of production produced and sold from the lease." 25 C.F.R. 211.43(a)(2) (2001). The regulations further state, however, that "[a] lower royalty rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b) (2001).

United States. The Tribe's reservation comprises more than 25,000 square miles, and spans parts of northeast Arizona, northwest New Mexico, and southeast Utah. Over the past century, large deposits of minerals—including coal, oil, and gas—have been discovered on the Tribe's reservation lands, which are held for the Tribe in trust by the United States. Each year, the Tribe receives tens of millions of dollars in royalty payments pursuant to mineral leases that it has entered into with private companies in accordance with the IMLA. See C.A. App. A2255-A2262.

a. Peabody Coal Company (Peabody) mines coal on the Tribe's lands pursuant to leases covered by the IMLA. Lease 8580 was executed by the Tribe and Peabody (through its predecessor in interest, the Sentry Royalty Company), and was approved by the Secretary in 1964. J.A. 188-244. The lease established a royalty rate of 37.5 cents per ton of coal, but provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. J.A. 194. In 1966, Peabody (through Sentry Royalty Company) entered into two other coal leases, Lease 9910 and Lease 5743. Those leases contained somewhat higher royalty rates than Lease 8580, see C.A. App. A2678, but did not contain a provision subjecting the rates to reasonable adjustment by the Secretary.[3]

[3] Leases 9910 and 5743 cover coal located within a former joint use area shared by the Navajo Nation and the Hopi Tribe. The Navajo Nation and Hopi Tribe split the revenues received from those leases. See C.A. App. A1988, A2678. Leases 9910 and 5743 paid royalties of 6.67 percent for coal sold off the leases and 5.33 percent for coal sold on the leases. *Id.* at A2678.

b. In the 1970s, the Tribe sought to renegotiate its existing mineral leases with its private lessees, including Peabody, to increase the royalty payments generated by those leases. As the 20-year anniversary of Lease 8580 approached, the royalty rate established by that lease of 37.5 cents per ton was "equivalent to about 2% of gross proceeds" on the lease. Pet. App. 2a. That rate was considerably higher than the minimum royalty rate (ten cents per ton) established by the IMLA regulations for coal leases subject to approval by the Secretary, 25 C.F.R. 211.15(c) (1985), but at the same time it was less than the minimum rate (12 1/2 percent of gross proceeds) that was set by Congress in 1977 for coal mined on federal lands under the Mineral Leasing Act. See 30 U.S.C. 207(a); Pet. App. 38a.[4]

In March 1984, the Chairman of the Navajo Tribal Council wrote to the Secretary and asked him to adjust the royalty rate under Lease 8580, in accordance with the term of that lease allowing a "reasonable adjustment" by the Secretary after 20 years. C.A. App. A375-A376. The Chairman claimed that an increase substantially in excess of 12 1/2 percent was warranted in light of the quality of the coal, but that "simple equity" indicated that the royalty rate should not be less than the 12 1/2 percent provided for under federal coal leases. *Id.* at A375. The Chairman also sought the

[4] Twelve and one-half percent is the customary royalty rate for coal leases on federal lands for leases issued or readjusted after 1976. See Minerals Mgmt. Serv., U.S. Dep't of the Interior, *General Federal and American Indian Mineral Lease Terms* <http://www.mrm.mms.gov/Stats/pdfdocs/lse_term.pdf.>. All Indian coal leases that were executed or readjusted during the period from 1985 to 1996 had a royalty rate at or below 12 1/2 percent. *Navajo Nation* v. *Peabody Holding Co.*, No. 99-469, 2002 WL 1457121, at *5 (D.D.C. June 24, 2002).

Secretary's "assistance and support in securing the voluntary adjustment" in the royalty rates under mineral leases that did not contain an adjustment clause like Lease 8580's but that, in the Chairman's view, contained rates that were "unfair and inequitable." *Id.* at A376.

In June 1984, the Area Director of the Bureau of Indian Affairs for the Navajo Area, Donald Dodge, acting pursuant to the Tribe's request, unilaterally adjusted the royalty on Lease 8580 from 37.5 cents per ton to 20 percent of gross proceeds. The 20 percent rate was well in excess of the royalty rate (12 1/2 percent of gross proceeds) governing federal coal leases. The Area Director reached his decision on the royalty adjustment in consultation with the Tribe. See C.A. App. A2685. The Area Director then notified Peabody of his adjustment. Pet. App. 2a-3a; J.A. 8-9.

c. Peabody appealed the Area Director's decision pursuant to 25 C.F.R. 211.2 (1985), challenging, *inter alia*, the Area Director's failure to consult Peabody before reaching his decision (C.A. App. A2288-A2315).[5] The appeal was taken under consideration by Acting Assistant Secretary of the Interior for Indian Affairs, John Fritz. Shortly thereafter, the Tribe broke off

[5] The Department of the Interior's regulations allowed "any interested party adversely affected by a decision * * * of an Area Director of the Bureau of Indian Affairs not approved by the Secretary before the decision was made" to file an administrative appeal. 25 C.F.R. 2.3(a) (1985). The appellant was required to serve the notice of appeal on any other known interested parties, 25 C.F.R. 2.11 (1985), who had the right to file a response, 25 C.F.R. 2.12 (1985). In this case, Peabody (and the utility companies that used coal produced under the lease) appealed the Area Director's royalty adjustment decision to the Commissioner of Indian Affairs. The Tribe filed an answer brief in opposition to those appeals. C.A. App. A477-A483.

negotiations with Peabody on the proposed amendments. Pet. App. 39a-40a.

While its appeal was pending, Peabody wrote to Department of the Interior (DOI) officials, asking them to postpone a decision on its appeal to allow for a negotiated settlement with respect to a full range of issues, including the royalty rate adjustment to Lease 8580. C.A. App. A2686. On July 5, 1985, a Peabody Vice President wrote to Secretary of the Interior Donald Hodel, reporting that following Peabody's appeal of the Area Director's decision, the Tribe continued to negotiate with Peabody toward an agreement providing for a royalty rate of 12 1/2 percent. The Peabody Vice President stated, however, that the Tribe apparently had received word of an imminent decision in the Tribe's favor in the pending appeal, and that the Tribe was suspending negotiations until DOI ruled on the appeal. The Peabody Vice President asked the Secretary to assume jurisdiction of its appeal and either postpone a decision in the appeal to allow a negotiated resolution or rule in Peabody's favor. J.A. 98-100. A copy of that letter was sent to the Tribe. J.A. 100.

In response, the Chairman of the Tribe wrote to the Secretary, stating that negotiations had become stalled over such issues as Peabody's request to mine additional coal and "very difficult" other matters, and expressing the view that, contrary to Peabody's assertion, he was "not confident" that a voluntary agreement could be reached on the royalty rate adjustment and other lease terms. J.A. 119-121. The Chairman urged the Secretary to reject Peabody's request and see to it that the Department issued a decision on the appeal in the Tribe's favor. J.A. 121; Pet. App. 40a.

Peabody retained Stanley Hulett, a former aide and friend of Secretary Hodel, and sought a meeting with the Secretary. The record indicates that Hulett and Peabody representatives met with Secretary Hodel in July 1985. J.A. 102. On July 17, 1985, Secretary Hodel sent a memorandum to Acting Assistant Secretary Fritz (J.A. 117-118), which had been provided to the Secretary by Peabody, "suggest[ing]" that he inform the parties "that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." J.A. 117. The Secretary's memorandum explained that "[a]ny royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. *Ibid.* The Secretary assured the Acting Assistant Secretary, however, "that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." J.A. 118.[6]

d. The Tribe "has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results," and at most "admit[s] that 'someone from Washington' had

[6] The court of appeals appears to have believed that Acting Assistant Secretary Fritz had decided Peabody's appeal in favor of the Tribe, but then withdrew that decision in response to the Secretary's July 1985 memorandum. Pet. App. 3a. Although a draft decision in favor of the Tribe had been prepared, the record does not establish that a final decision (which would have required the signature of the Commissioner of Indian Affairs, 25 C.F.R. 2.3, 2.19 (1985)) had been issued. See Pet. App. 40a; C.A. App. A2686-A2687. In any event, even if the Acting Assistant Secretary had issued his decision, the Department's regulations authorized the Secretary "to direct any [Department employee] to reconsider a decision." 43 C.F.R. 4.5(a)(2) (1985).

urged a return to the bargaining table." Pet. App. 43a; see C.A. App. A2370, A2589, A2690-A2691. In any event, in late August 1985, the Tribe and Peabody renewed their negotiations. On September 23, 1985, they reached a tentative agreement over a package of amendments not only to Lease 8580 but also to Leases 9910 and 5743. Pet. App. 42a. The negotiated agreement resolved a broad range of issues concerning the existing leases between the parties. J.A. 277-311.

In particular, "[i]n consideration of the benefits associated with these lease amendments," the parties agreed to move jointly to vacate the Area Director's July 1985 decision imposing a royalty rate adjustment under Lease 8580 to 20 percent. J.A. 286-287. Instead, the parties agreed to adjust the royalty rate under Lease 8580 from 37.5 cents per ton to 12 1/2 percent of the monthly gross proceeds. J.A. 287. Peabody further agreed to pay royalties at the new 12 1/2 percent rate on all coal mined under the lease since February 1, 1984, more than a year and a half earlier. *Ibid.* Peabody also agreed to increase the royalty rates with respect to Leases 9910 and 5743, even though those leases, unlike Lease 8580, did not contain any provision for the adjustment of the royalty rate during the lease. C.A. App. A2678, A2692.

At the same time, Lease 8580 was amended to acknowledge the validity of tribal taxation of coal production, and recognize the Tribe's agreement to waive certain back tribal taxes. J.A. 295-296, 298-299. The tax rate was to be capped at eight percent, which "would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined." Pet. App. 44a.[7] Peabody further agreed to pay the Tribe

[7] This Court had just upheld the right of the Navajo Nation to impose taxes on lessees under tribal leases. See *Kerr-McGee Corp.*

$1.5 million when the amendments became effective, and $7.5 million when it began mining additional coal agreed to by the parties as part of the lease amendments. J.A. 292-293. The agreement "also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments." Pet. App. 43a.

e. In August 1987, the Navajo Tribal Council approved the lease amendments, finding that they were in "the best interest of the [Tribe]." C.A. App. A2432-A2433. A final agreement was signed by the parties in November 1987. The parties then asked Secretary Hodel to approve their agreement. The Secretary formally approved the lease amendments on December 14, 1987. J.A. 337-339. Shortly thereafter, and in accordance with the agreement between the Tribe and Peabody, the Area Director's June 1984 decision adopting a 20 percent royalty rate was vacated. Pet. App. 45a.

3. In 1993, the Tribe brought suit against the United States in the Court of Federal Claims, alleging, *inter alia*, that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody adjusting the royalty rate on Lease 8580 to 12 1/2 percent of gross proceeds constituted a breach of trust. The Tribe did not seek to invalidate the lease amendments approved by the Secretary, but instead sought $600 million in damages while keeping the amendments to all three leases in effect. On cross-motions for summary judg-

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v. *Navajo Tribe*, 471 U.S. 195 (1985); Pet. App. 39a-40a. The Area Director's decision imposing a 20 percent royalty rate was rendered prior to *Kerr-McGee*.

ment, the Court of Federal Claims granted judgment for the United States. Pet. App. 31a-79a.

The Court of Federal Claims found that the United States had entered into a general fiduciary relationship with the Navajo Nation by virtue of its relationship with Indian Tribes and the fact that the United States holds tribal lands in trust. Pet. App. 48a. The court noted that the relationship between Indians and the United States "is not necessarily described by the common law of trusts," but the court nevertheless first considered the government's actions against the duties that would be recognized by a court of equity as governing the actions of a common law trustee. *Ibid.* Applying the common law, the court concluded that the Secretary had contravened fiduciary duties of care, loyalty, and candor by meeting with Peabody while its administrative appeal was pending and not disclosing that meeting to the Tribe. *Id.* at 48a, 52a. The court further observed that, "[w]ere this a court of equitable jurisdiction considering a private trust, [the Tribe] might easily qualify for remedies typically afforded wronged beneficiaries." *Id.* at 52a. But those circumstances, the court explained, "do not themselves confer jurisdiction on this Court, nor entitle [the Tribe] to money damages." *Ibid.*

Rather, the court continued, "to succeed in litigation in this Court, [the Tribe] must show that IMLA imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages." Pet. App. 53a. In determining whether the Tribe had made that showing, the court reviewed the IMLA and the Secretary's implementing regulations in the light of this Court's decisions in *United States* v. *Mitchell*, 445

U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). See Pet. App. 54a, 59a-61a.

The court observed "that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity." Pet. App. 55a. But after reviewing the IMLA and the Secretary's implementing regulations, the court concluded that the United States's "responsibility as it relates to coal royalties does not rise above a generalized trust obligation," which, the court explained, is not sufficient under the *Mitchell* decisions to create a duty that, if breached, would require the government to pay damages. *Id.* at 66a; see *id.* at 67a ("[N]either IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal."). The court further concluded that, although the Tribe's complaint "[a]lleg[ed] breaches of general fiduciary duties, [it] * * * failed to link any breach to a specific money-mandating statutory or regulatory provision." *Id.* at 66a.

The court emphasized that the Tribe "cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process." Pet. App. 67a. Indeed, the court noted that in this case "the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease*" between the Tribe and Peabody—*i.e.*, the provision of Lease 8580 allowing the Secretary to make a "reasonable adjustment" in the royalty rate after 20 years, *ibid.*—rather than from a statute or regulation. "Even then," the court continued, "the Secretary's only guidance was to be 'reasonable' in revising rates." *Id.* at 67a-68a. The court acknowledged that, "as a matter of

policy, DOI would not approve coal leases with royalties less than those the [United States] would receive for its own coal," *i.e.*, 12 1/2 percent. *Id.* at 68a. But, the court noted, "[n]owhere does that policy, nor any other policy, impose an affirmative duty to interject government-dictated royalty rates," and the Tribe did not in any event assert "that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy." *Ibid.*[8]

4. a. The Court of Appeals for the Federal Circuit reversed. Pet. App. 1a-30a. The court began by discussing this Court's *Mitchell* decisions, see *id.* at 5a-6a, and its own precedents involving breach of trust claims by Indians, including its recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), cert. granted, No. 01-1067 (Apr. 22, 2002). In *White Mountain Apache*, the court noted, "[a]lthough the statute [at issue] was silent on how the United States was to administer the property," the court looked to the common law of trusts and found in the common law a duty on the part of the United States enforceable in a suit for damages, "despite the absence of a specific statute and regulations." Pet. App. 6a.

The court of appeals then analogized this case to *Mitchell II*, where this Court held that the Tribe was entitled to damages for the alleged breach of trust with respect to Indian timber management. The court of appeals believed that the degree of federal involvement in this case with respect to mineral leasing on Indian

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[8] The Court of Federal Claims also rejected the Tribe's independent claim for breach of contract with respect to the Lease 8580, finding that the Secretary was not a party to that lease, and that the Secretary's authority under the lease to adjust the royalty rate was not a binding contractual obligation on him to do so. Pet. App. 69a-75a.

lands was comparable to the degree of federal involvement in Indian timber management under the governing statutes and regulations in *Mitchell II*. Pet. App. 8a; see *id.* at 8a-10a. Pointing to 25 U.S.C. 399 (which, as explained below, is not part of the IMLA), the court also concluded that "the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes." Pet. App. 9a, 11a. With that understanding, the court concluded that the Court of Federal Claims had erred in finding that there was not a sufficient trust relationship between the United States and the Tribe with respect to coal resources that could give rise to a claim for money damages for breach of trust here. *Id.* at 11a.

After finding the existence of such a trust relationship, the court of appeals held that the Secretary's actions with respect to Peabody's administrative appeal concerning the adjustment of the royalty rate under Lease 8580—which the court characterized as "suppressing and concealing" the decision of the Acting Assistant Secretary and "thereby favoring Peabody's interests to the detriment of Navajo interests," Pet. App. 11a—violated both the common law duties on which the Court of Federal Claims had relied, as well as what the court of appeals described as a statutory duty "to obtain for the Indians the maximum return for their minerals." *Id.* at 12a. The court did not, however, identify what specific provision of the IMLA or the Secretary's implementing regulations had imposed such a duty upon or had been violated by the Secretary. Nonetheless, citing *Mitchell II*, the court concluded that the Tribe was entitled to damages for breach of the fiduciary duties the court had described. *Id.* at 12a-13a; see *id.* at 12a ("Breach by the federal government of its fiduciary duty is subject to remedy by the assessment

of 'damages resulting from a breach of the trust.'"). The court remanded for further proceedings, including a determination of damages. *Id.* at 13a.

b. Judge Schall concurred in part and dissented in part. Pet. App. 13a-30a. Drawing on this Court's *Mitchell* decisions, he reasoned that it is not enough for a Tribe to show a violation of a general fiduciary relationship stemming from federal involvement in a particular area of Indian affairs. Rather, "to state a claim upon which relief can be granted," Judge Schall reasoned, a Tribe "must show the breach of a specific fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue." *Id.* at 29a-30a; see *id.* at 16a ("[U]nder *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship.").

Judge Schall agreed that the IMLA and implementing regulations create a "general fiduciary relationship" between the United States and the Tribe, but at "this point [he] part[ed] company with the majority." Pet. App. 25a. In his view, "the only government action in this case that implicated a specific fiduciary responsibility to the [Tribe] was DOI's approval of the Agreement" in 1987. *Id.* at 26a. He explained that, even if the government's actions "may demonstrate disloyalty to the [Tribe] in a vacuum," the Tribe was required to show that the government breached a specific fiduciary obligation with respect to the agreed package of lease amendments. *Id.* at 28a. Judge Schall concluded that the Secretary had breached such a duty by failing to conduct an economic analysis of the lease agreement, which, he found, citing common law principles, was implicit in the Secretary's authority to approve the lease amendments. *Ibid.*; see *id.* at 26a-27a.

SUMMARY OF ARGUMENT

The Tribe is not entitled to money damages for the alleged breach of trust in this case, because it has failed to show the violation of any statute or implementing regulation that would mandate compensation by the government if breached.

A. The United States is immune from suit for damages, except as clearly authorized by Congress. In the Tucker Act and the Indian Tucker Act, Congress has waived sovereign immunity from damages actions against the United States with respect to claims based on an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491(a)(1). This Court has further emphasized that, to recover damages under one of the Tucker Acts, a plaintiff must show the violation of a statute or implementing regulation that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. In recent cases, this Court has emphasized that it is unwilling to venture beyond the terms of the governing Act of Congress when it comes to determining whether Congress has in fact authorized a private cause of action or private remedy in such an action. *E.g.*, *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268 (2002). Such restraint is all the more necessary when, as here, the question is whether Congress has authorized a damages remedy against the sovereign itself.

B. The court of appeals erred in holding that the United States may be liable in damages for the alleged breach of trust in this case, because the court failed to identify the violation of any specific statutory or regulatory duty, much less find that the government violated a statute or regulation that would clearly mandate the payment of damages. Instead, the court of

appeals simply reasoned at an abstract level that, under *Mitchell II*, damages were available against the United States because, in the court's view, the government had breached a general trust relationship with the Tribe in connection with the lease amendments at issue. Pet. App. 12a. That reasoning finds no support in *Mitchell II*. There, each of the Indians' breach-of-trust claims was carefully grounded on the violation of specific statutory or regulatory duties. In addition, the court of appeals' reasoning contradicts the terms of the Tucker Act, which grant jurisdiction and waive the sovereign immunity of the United States with respect to claims based on the violation of an "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491(a)(1), and not claims based on breaches of generalized trust principles identified by a court.

In finding that the United States had breached a trust duty triggering a damages remedy, the court of appeals focused on what it called "[t]he action of the Secretary in suppressing and concealing the decision of the Deputy Assistant Secretary" with respect to Peabody's administrative appeal of the Area Director's decision unilaterally to increase the royalty rate on Lease 8580 to 20 percent of the gross proceeds. Pet. App. 11a. But nothing in the IMLA or in the Secretary's regulations implementing the IMLA imposes any specific duties on the handling of such appeals. Nor was the court of appeals free to override or supplement the general procedural rules governing such appeals. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Moreover, procedural rules are not by their nature fairly capable of being interpreted as mandating the payment of damages against the government if violated.

Although the court of appeals did not point to the violation of any specific statute or regulation, the Tribe has argued that the Secretary's actions violated a requirement in the IMLA and its implementing regulations to act in the "best interests" of the Indians. The statutory language on which the Tribe has relied, however, comes from a provision (25 U.S.C. 396b) that governs the *rejection* of *oil and gas* leases, and not the *approval* of *coal* leases, which is governed by a different provision (25 U.S.C. 396a) that contains no "best interests" language. The Tribe also points to a regulation (25 C.F.R. 211.43(b) (2001)), but that provision was not adopted until a decade *after* the events at issue. In addition, that regulation requires the Secretary to consider the "best interest of the Indian mineral owner" only when the owner has agreed to a royalty rate that is *less* than the minimum rate for leases of federal coal. *Ibid.* The regulation in no way obligates the Secretary to make such a finding before approving a lease—such as the amendments in this case—with a rate equal to or *more* than the minimum federal rate for coal.

The Tribe also argues that the Secretary was required to conduct an independent economic analysis before approving the lease amendments in this case. But no provision of the IMLA or regulation implementing that Act obligates the Secretary to conduct such an analysis. In the absence of such a specific statutory or regulatory duty, the Tucker Act does not subject the United States to money damages for any claim that the Secretary inappropriately failed to conduct such an analysis. Furthermore, judicial implication of such an independent economic analysis requirement would conflict with the IMLA's focus on permitting Indian mineral lease owners to negotiate their own rates, subject to the backstop protection of

the minimum rate, which the lease amendments in this case generously *exceeded*.

C. Relying on *Mitchell II*, the court of appeals reasoned that the federal involvement with respect to Indian mineral leasing was itself sufficient to subject the United States to damages for any alleged breach of trust in connection with Indian mineral leases. That analytical approach was mistaken. To begin with, the level of federal involvement in Indian mineral leasing is fundamentally different, and less encompassing, than the federal involvement in Indian timber management. Indeed, in *Mitchell II*, this Court emphasized that the United States had assumed "pervasive" control over Indian timber management, and had regulated "virtually every aspect of [Indian] forest management." 463 U.S. at 220. By contrast, the key provision of the IMLA transferred Indian mineral leasing authority from the Secretary *to the Tribes*, 25 U.S.C. 396a, and one of the central objectives of that Act is to foster Indian self-determination. Cf. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989).

Moreover, to the extent that the Court discussed the federal control over Indian timber management in *Mitchell II*, it explicitly focused on the "fiduciary management duties" that the government had assumed over Indian timber. 463 U.S. at 218. As the Court explained, the statutes and regulations at issue in *Mitchell II* expressly provided that, *inter alia*, sales of Indian timber made by the government on behalf of Indians shall be based upon a consideration of "the needs and best interests of the Indian owner and his heirs," as well as the "present and future financial needs of the owner and his heirs." *Id.* at 222 (quoting statutes). Congress has not imposed, and the Secretary has not assumed, any comparable fiduciary manage-

ment duties with respect to Indian mineral leasing. To the contrary, the focus in the IMLA is on permitting Indian mineral lease owners to negotiate their *own* royalty rates. Furthermore, the Court in *Mitchell II* did not focus simply on the existence of federal control; it looked to whether the statutes and regulations on which the plaintiffs relied could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they [*i.e.*, the statutes and regulations] impose[d]." *Id.* at 219.

D. The court of appeals also erred in treating the United States as if it were a simple private trustee, liable in money damages to an Indian Tribe for breach of duties that might be recognized at common law. Neither the Tucker Act nor, even more tellingly, the Indian Tucker Act, confers jurisdiction with respect to claims based on the violation of the common law. Instead, as pertinent here, those Acts confer jurisdiction only over claims based on the violation of an Act of Congress or implementing regulation. Holding that the United States may be liable in damages for breach of duties drawn by a court from the common law not only would greatly expand the potential liability of the United States for breach of trust, but also would conflict with well-established principles of sovereign immunity and the terms of the Tucker Acts, which require claimants to point to the violation of a source of positive law that clearly mandates the payment of damages if violated. Because the court of appeals did not identify the violation of any such source of law, and none is available with respect to the alleged breach of trust in this case, the Tribe's damages claims should be dismissed.

ARGUMENT

THE UNITED STATES HAS NOT VIOLATED ANY "ACT OF CONGRESS" OR "REGULATION OF AN EXECUTIVE DEPARTMENT" THAT WOULD SUBJECT IT TO MONEY DAMAGES FOR THE ALLEGED BREACH OF TRUST

A. The United States Is Immune From Suit Except As Clearly Authorized By Congress

This case, like *United States* v. *White Mountain Apache Tribe*, No. 01-1067, turns on basic principles governing the sovereign immunity of the United States from suit, and the limited statutory jurisdiction of the Court of Federal Claims to entertain claims for damages against the United States.

1. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *Eastern Transp.* v. *United States*, 272 U.S. 675, 686 (1927); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1868). In determining whether such consent is present, this Court has long held that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); accord *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992).

2. Congress has consented for the United States to be sued on certain claims for money damages in the

Court of Federal Claims. The Tucker Act grants that court jurisdiction with respect to

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1).

The Indian Tucker Act grants jurisdiction to the same court with respect to claims by an Indian Tribe against the United States, "whenever such [a] claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. 1505. As this Court has explained, the Indian Tucker Act was enacted in 1946 to ensure that Indian or tribal claimants would enjoy the "same" rights and remedies in suits against the United States as non-Indians, but no more. *Mitchell I*, 445 U.S. at 539; see *Mitchell II*, 463 U.S. at 212 n.8; H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945) (Indian "claimants are to be entitled to recover in the same manner, *to the same extent, and subject to the same conditions and limitations*, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought [under The Tucker Act] by non- Indians.") (emphasis added).

The Tucker Acts themselves do "not create any substantive right enforceable against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 738 (1982); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Thus, in order to state a cause of action

under one of the Tucker Acts, a plaintiff suing other than for breach of contract must point to an "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491(a)(1), that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217 (quoting *Testan*, 424 U.S. at 400, and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 905-906 n.42 (1988); *Sheehan*, 456 U.S. at 739.[9] The requisite waiver of sovereign immunity is present under the Tucker Acts only if "a claim falls within th[at] category." *Mitchell II*, 463 U.S. at 218; see *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990).

This Court has observed that "the substantive source of law may grant the claimant a right to recover damages either 'expressly or by implication.'" *Mitchell II*, 463 U.S. at 217 n.16; but cf. *Sheehan*, 456 U.S. at 739-740 ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly."). But the Court is reluctant to recognize a damages remedy against the United States under the Tucker Acts when a statute does not clearly sanction one. See *Testan*, 424 U.S. at 400 ("We are not ready to tamper with these established principles [concerning the reach of the Tucker Act] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy."); see also *Mitchell II*, 463 U.S. at 218 ("Of course, in determining the general scope of the Tucker Act, this Court has not lightly

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[9] The Indian Tucker Act also permits claims by an Indian Tribe based on a Treaty of the United States or an Executive Order of the President. 28 U.S.C. 1505. No such claim is at issue here.

inferred the United States' consent to suit.") (citing cases). That restraint reflects the general rule that waivers of sovereign immunity must be unequivocally expressed. See *Mitchell I*, 445 U.S. at 538; *OPM* v. *Richmond*, 496 U.S. 414, 432 ('990).

The requirement of such restraint is reinforced by the Court's repeated refusal in more recent decisions to recognize implied private causes of action or remedies outside of the Tucker Act context, even in suits against parties other than the United States. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2275 (2002) (federal statute must contain "unambiguously conferred right" for suit to lie under Section 1983); *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001) (declining to extend implied cause of action established by *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to new context); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) (no implied right of action to enforce disparate-impact regulations under Title VI); *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994) (declining to recognize implied right of action under *Bivens* against federal government).

3. This Court's *Mitchell* decisions involved actions that were brought by Indian claimants under the Tucker Acts and were governed by the general principles outlined above. In the *Mitchell* litigation, the Quinault Tribe and individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—under which the United States holds allotted lands "in trust for the sole use and benefit of the Indian [allottees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not authorize a damages

action against the United States for alleged mismanagement of timber resources on allotted lands. The Court explained that the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]," and that it did "not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of allotted lands." *Id.* at 542 (emphasis added).[10] Thus, the Court held, the General Allotment Act did not support "[a]ny right of the [Indians] to recover money damages for Government mismanagement of timber resources." *Id.* at 546.

In *Mitchell II*, the Court considered a different set of statutes and regulations and held that those provisions, unlike the General Allotment Act, could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose[d]." 463 U.S. at 219. In so holding, however, the Court emphasized that the provisions established "comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber," *id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"), and that "the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Id.* at 226.[11]

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[10] The Court explained that Congress provided for allotted lands to be held "in trust" simply because it wanted to prevent alienation of the land and to ensure that allottees would be immune from state taxation. *Mitchell I*, 445 U.S. at 544.

[11] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the statutes and regulations in that case failed to confer "the necessary legislative authorization of a damages remedy"

As explained below, a proper understanding of the *Mitchell* decisions—and application of the basic principles governing suits against the United States and limitations on implied rights to recover money damages—compels the conclusion in this case that the Tribe has failed to state a claim for damages.

B. The Tribe Has Not Shown The Violation Of Any Statute Or Regulation That Would Mandate The Payment Of Damages By The Government If Breached

The court of appeals' decision in this case founders on one central and inescapable conclusion: it holds that the United States may be liable in damages for alleged breach of trust without finding the violation of any particular statute or regulation that, even if breached, would mandate the payment of damages. In his separate opinion, Judge Schall recognized that shortcoming. See Pet. App. 26a (The "majority errs" by "fail[ing] to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations [at issue]."); see also *id.* at 28a, 29a-30a. The Court of Federal Claims similarly recognized that fatal jurisdictional defect in the Tribe's claim. *Id.* at 66a ("Alleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific

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against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400). They emphasized that "courts are not free to dispense with 'established principles' requiring explicit congressional authorization for maintenance of suits against the United States simply 'because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.'" *Id.* at 232 (quoting *Testan*, 424 U.S. at 400).

money-mandating statutory or regulatory provision."); see *id.* at 53a, 57a, 68a.

1. The Tucker Act, in clear and unmistakable terms, confers jurisdiction with respect to claims that are founded upon an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491. That requirement is just as applicable in a case brought by an Indian Tribe alleging breach of trust as it is, for example, in a case brought by a federal employee seeking back pay for allegedly improper job classification in federal employment. Cf. *United States* v. *Testan*, *supra*. Indeed, as discussed above, the Indian Tucker Act was enacted to ensure that Indian claimants would be able to recover damages against the United States "in the same manner," but also "subject to the same conditions and limitations," as non-Indian claimants. H.R. Rep. No. 1466, *supra*, at 13; see p. 22, *supra*.

Mitchell II illustrates the point. Although the Indian plaintiffs in that case "alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands," 463 U.S. at 207, their claims tracked specific duties set forth in the statutes or regulations governing federal Indian timber management. See *id.* at 210 (describing claims); *id.* at 211, 219-224 (discussing statutes and regulations on which the damages claims were predicated); see also, *e.g.*, 25 U.S.C. 406(a) (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c) (1985) (timber "shall be appraised" and sold at not less than

appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

More to the point, in analyzing "whether the United States [was] accountable in money damages for alleged breaches of trust in connection with its management of [Indian] forest resources," *Mitchell II*, 463 U.S. at 207, the Court first examined the "various Acts of Congress and executive department regulations" on which the Indian plaintiffs "based their money claims against the United States." *Id.* at 219; see *id.* at 219-223. Then, after examining those sources of "substantive law," it looked to "whether *they* [*i.e.*, the statutes or regulations on which the plaintiffs relied] can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." *Id.* at 219 (emphasis added). *Mitchell II* thus teaches that, even when the United States might be said to have assumed a general trust relationship with an Indian Tribe or with respect to certain Indian resources, a damages claim for breach of trust must be grounded on the violation of a specific statute or regulation that gives content to that relationship. See *id.* at 224 (The statutes and regulations governing Indian timber management "establish a fiduciary relationship *and define the contours of the United States' fiduciary responsibilities.*") (emphasis added).

The court of appeals in this case, however, analyzed the breach of trust issue almost entirely at a higher level of abstraction, focusing on whether "a trust relationship indeed existed and exists with the Nation." Pet. App. 2a; see *id.* at 11a ("The Court of Federal Claims erred in holding that there was no authorization for a trust relationship between the United States and the Navajo Nation as to coal resources."). Even if the

IMLA and the Secretary's implementing regulations established a generalized trust relationship similar to that which this Court found in *Mitchell II* with respect to Indian timber resources, the court of appeals did not find—and the Tribe has not shown—the violation of any specific duty imposed by the statutes or regulations giving content to that relationship, much less the violation of a specific statutory or regulatory duty that could fairly be interpreted as mandating compensation by the government if breached. See Pet. App. 26a (Schall, J., concurring in part and dissenting in part); *id.* at 66a (Court of Federal Claims). Instead, the court of appeals simply stated that "monetary damages are an available remedy [against the United States] for breach of th[e] trust." *Id.* at 2a; see *id.* at 12a ("Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of 'damages resulting from a breach of the trust.'").

That mode of analysis cannot be squared with this Court's focus in *Mitchell II* on the specific statutes and regulations on which the damages claims in that case were based. Nor can it be squared with explicit jurisdictional requirements of the Tucker Act. The court of appeals' failure to identify the violation of any specific "Act of Congress" or "any regulation of an executive department" (28 U.S.C. 1491(a)(1)) that would mandate the payment of damages by the government if breached was clear error. And that error alone compels reversal of the judgment below.

2. The alleged breach of trust on which the court of appeals did focus in its decision underscores how far the court strayed from the terms of any specific statutes or regulations that conceivably could be implicated in this case. In finding that the United States had breached a duty to the Tribe that would entitle the

Tribe to damages, the court of appeals did not object to the Secretary's approval of the lease amendments in 1987, or to the fairness of the lease package that the Tribe negotiated with Peabody and asked the Secretary to approve in 1987. Instead, the court pointed to what it characterized as the "[t]he action of the Secretary in suppressing and concealing the decision of the Deputy Assistant Secretary" on Peabody's administrative appeal concerning the adjustment of the royalty rate pursuant to a provision in Lease 8580 that was *superseded* by those amendments. Pet. App. 11a; see *id.* at 11a-12a. But even accepting the court of appeals' characterization of events, the Secretary's actions did not violate any statutory or regulatory duty, much less one that would mandate the payment of damages for a violation.

a. Nothing in the IMLA or its implementing regulations imposes any specific duties on the Secretary with respect to the handling of administrative appeals. Rather, it is Interior Department regulations of general applicability that establish a process for appeals from administrative actions by various Department officials, see 25 C.F.R. Pt. 2 (1985 & 2001), and the procedural standards governing that process are defined by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the Interior Department regulations, not by the IMLA. The court of appeals did not find that the Secretary's actions violated any provision of the Department's procedural rules or the APA. And, in fact, the Department rules in effect at the time the Secretary acted provided that nothing in the regulations governing hearings and appeals "shall be construed to deprive the Secretary of any power conferred upon him by law," including, but not limited to, the authority to take jurisdiction of any case

pending before any employee and to render a final decision on it, and the authority to review any decision of any employee or to direct any such employee to reconsider a decision. 43 C.F.R. 4.5(a)(1) and (2) (1985).

Nor was the court of appeals free to override or supplement the procedural rules adopted by the Secretary with its own view of the proper relationship between the Secretary and a subordinate official concerning an internal agency appeal. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Indeed, the court of appeals seriously misapprehended the constitutional structure of our government in characterizing the decision by the Head of an Executive Department not to allow a draft of a decision of a subordinate officer to go into effect as the improper "suppressing and concealing" (Pet. App. 11a) of the action of one of his subordinates. And it seriously misapprehended *Mitchell II* and the general Tucker Act principles discussed above in finding that such action, even if it had violated some procedural rule, entitled the Tribe to money damages.

b. Even if the Secretary had violated some procedural rule in handling Peabody's administrative appeal, that would not entitle the Tribe to damages under the Tucker Act. As discussed above, only a statute or regulation that "can fairly be interpreted as mandating compensation" may support a claim for damages under the Tucker Act. *Mitchell II*, 463 U.S. at 216-217; p. 23, *supra*. None of the procedural regulations referred to by the court of appeals, or relied upon by the Tribe, creates a right to be paid a sum certain, speaks in terms of money damages or claims, or has any other monetary character at all. See *Testan*, 424 U.S. at 400; *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., joined by Rehnquist and O'Connor, JJ., dissenting) ("Although not disposi-

tive, the monetary character of a statutory right is a strong indication that a statute 'in itself . . . can fairly be interpreted as mandating compensation.'"); cf. *Gonzaga Univ.*, 122 S. Ct. at 2274 (right of action has been recognized under 42 U.S.C. 1983 when a statute "conferred specific monetary entitlements" or required payment of "'objective' monetary entitlement").

Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim under the Tucker Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Accordingly, instead of a suit for money damages, any recourse that the Tribe might have had for an alleged violation of a procedural rule in the course of the Secretary's approval of the lease amendments would have been available, if at all, only in an action under the APA to set aside the Secretary's 1987 decision approving the lease amendments, or to challenge the suspension of (or seek the reinstatement of) the administrative appeal proceedings concerning the Area Director's decision to increase the royalty rate under the adjustment clause of Lease 8580. The Tribe has never brought such an action, however; instead, it has brought this action seeking damages for breach of trust while seeking to retain all the benefits of the entire package of lease amendments negotiated by the parties and approved by the Secretary in 1987.

The court of appeals' reliance on the Secretary's actions with respect to Peabody's administrative appeal was misplaced for another reason as well. As the Court of Federal Claims noted, the Secretary's authority to adjust the royalty rate at issue in this case was "*derive[d] solely from the terms of the lease*" that the Tribe had executed in 1964, not from the IMLA. Pet.

App. 67a. A breach predicated on the Secretary's actions provided for under the Lease would not be based on a violation of an Act of Congress or regulation, as the Tucker Acts require. Moreover, the lease simply authorized, but did not require, the Secretary to make a "reasonable adjustment" in the royalty rate, and what would be a reasonable adjustment under a lease entered into by both the Tribe and Peabody could properly take into account the interests of both parties, not those of the Tribe alone. Accordingly, even if (contrary to our submission, see pp. 37-39, *infra*) the IMLA or implementing regulations required the Secretary to disapprove a lease or lease amendment if she concluded that it would not maximize revenue to the Tribe concerned, the lease provision that authorized the Secretary's actions here imposed no such duty.

Finally, to the extent that the court of appeals believed that the Secretary's actions in 1985 in connection with the administrative appeal of the royalty rate adjustment under the provisions of the then-existing lease rendered his subsequent approval of the lease *amendments* a breach of fiduciary duty, it was mistaken. To establish a breach of fiduciary duty in approving the lease amendments, the Tribe at a minimum would be required to establish that the Secretary could not reasonably have believed that the overall outcome of the negotiated package—the lease amendments themselves—was in the Indian mineral owner's best interest. The Tribe has made no such claim. Cf. *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 312-313 (1989); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry * * * is at an end. The fact that the method employed

to reach that result may contain infirmities is not then important.").

The only provision of law governing mineral leases that arguably could be interpreted as requiring compensation for its breach is the regulation that set the minimum royalty rates for minerals subject to leasing, including coal. 25 C.F.R. 211.15(c) (1985). But the Tribe understandably has not alleged a violation of that provision. The lease amendments negotiated by the Tribe and approved by the Secretary in 1987 contained a royalty rate (12 1/2 percent of gross proceeds) well *in excess of* the minimum rate at that time for coal leases under IMLA—10 cents per ton, or less than *one* percent of gross proceeds. *Ibid.* Even the original royalty rate on Lease 8580 (37.5 cents per ton) was considerably higher than that standard. Following their amendment in 1987, the royalty rate under the three leases (*i.e.*, Leases 8580, 9910, and 5743, see p. 9, *supra*)—each of which provides for a total royalty rate of 12 1/2 percent—was well above the minimum rate. Indeed, all three leases would have satisfied the new standard that was subsequently adopted by the Secretary in 1996, nine years after the lease amendments in this case were approved. 25 C.F.R. 211.43(a)(2) (2001) (minimum royalty rate for open-pit or strip coal leases is 12 1/2 percent of the value of coal sold from lease).

c. The court of appeals did not specifically focus on the meeting in July 1985 between Secretary Hodel and representatives of Peabody, while Peabody's administrative appeal was pending, see Pet. App. 11a-12a, and the Tribe did not rely on that meeting as the act that allegedly gave rise to a right to recover money damages, see *id.* at 32a. But even assuming that the Tribe had no knowledge of that meeting, it would not have violated any statute or regulation mandating compensation if breached and, indeed, it would not have violated any substantive law at all.

The Interior Department's regulations governing appeals from a decision of an Area Director, such as Donald Dodge, allowed for an appeal to the Commissioner of Indian Affairs (Commissioner), and then to the Interior Board of Indian Appeals (IBIA or Board). 25 C.F.R. 2.3(a) (1985). In addition, the regulations allowed a party to transfer an appeal from the Commissioner to the Board if the appeal had been fully briefed and pending before the Commissioner for at least 30 days. 25 C.F.R. 2.19(b) (1985). If no party requested a transfer to the Board, the parties were deemed to have acquiesced in the Commissioner's jurisdiction after expiration of the thirty-day period. See *Urban Indian Council, Inc.* v. *Acting Deputy Assistant Secretary*, 11 Interior Bd. Indian Appeals 146, 153 (1983).

The general regulations governing appeals to the Department's various appeals boards established a formal appellate process. In particular, the regulations expressly barred ex parte contacts with the Board during the pendency of an appeal. 43 C.F.R. 4.27(b) (1985) ("There shall be no communication between any party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding, or an appeal, unless such communication (if written) is also furnished to the other party, or (if oral) is made in the presence of the other party."). In addition, the regulations limited the Board's appellate review to materials that were formally part of the record of appeal or subject to official notice. 43 C.F.R. 4.24 (1985).

By contrast, the regulations governing appeals to the Commissioner contained no prohibition against ex parte contacts and expressly provided that the Commissioner

could rely on "any information available to [him] * * * whether formally part of the record *or not*." 25 C.F.R. 2.20 (1985) (emphasis added). In other words, unlike the regulations governing appeals to the IBIA, "the agency has not granted anyone the right to be free of ex parte communications." *District No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n* v. *Maritime Admin.*, 215 F.3d 37, 43 (D.C. Cir. 2000).[12]

The Tribe acknowledged that it was aware of the regulation allowing transfer from the Commissioner to the Board after 30 days. J.A. 12. The Tribe, however, never exercised its option to transfer the appeal from the Commissioner to the Board, and it thereby foreswent the more formal procedures—including the explicit prohibition on ex parte contacts—that would have applied to proceedings before the Board. In any event, as in the case of the other procedural rules discussed above, a rule barring ex parte contacts during an administrative appeal cannot fairly be interpreted as

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[12] The APA bars ex parte contacts in formal administrative proceedings "required by statute to be made *on the record* after opportunity for an agency hearing." 5 U.S.C. 553(c) (emphasis added); see also 5 U.S.C. 554(a). Commissioner appeals are, as discussed, *not* required only to be "on the record." In any event, the APA's ban on ex parte contacts in formal administrative proceedings is scarcely the type of duty that may be fairly interpreted to mandate the payment of damages if breached. Rather, it is just the sort of procedural duty that, consistent with the APA's carefully limited remedial scheme, does *not* trigger any damages remedy. See *Lane* v. *Peña*, 518 U.S. 187, 196 (1996) ("Under the provisions of the APA, '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' is expressly authorized to bring '[a]n action in a court of the United States seeking relief *other than money damages*.'") (quoting 5 U.S.C. 702)) (emphasis added by this Court); cf. *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988).

mandating the payment of money damages if breached. At most, the violation of such a rule could entitle a party who timely objected to such contacts to a remedy under the APA, such as vacatur of administrative action that was preceded by such contacts, but not to money damages.

3. Although the court of appeals did not believe it was necessary to link the Tribe's damages claims to a violation of a specific statutory or regulatory duty that, if breached, would mandate the payment of damages (an error which, in itself, warrants reversal), the Tribe now attempts to do so. But its effort fails. The Tribe asserts (Br. in Opp. 17) that "both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians." The statutory language in 25 U.S.C. 396b on which the Tribe relies, however, governs the circumstances in which the Secretary may *reject* the highest bid for *oil and gas* leases; the statute governing the *approval* of *coal* leases (25 U.S.C. 396a) does not contain any comparable language.

The regulation cited by the Tribe (25 C.F.R. Pt. 211 (2001)) was not promulgated until 1996, almost a decade *after* the events at issue in this case. Moreover, whereas that regulation now obligates the Secretary to find that a lease is "in the best interest of the Indian mineral owner" when it provides for a royalty rate *less* than the minimum rate for leases of federal coal, the regulation notably does not require the Secretary to make such a finding before approving a lease—like the lease amendments at issue here—that has a royalty rate equal to or more than the minimum rate. 25 C.F.R. 211.43(b) (2001). The governing regulations thus refute the notion that the Secretary is obligated by the IMLA to ensure that every proposed lease agreed to by a

Tribe will maximize the return to the Tribe. See *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989).[13]

Indeed, in stark contrast to the particular statutory and regulatory provisions at issue in *Mitchell II*, see 463 U.S. at 222, neither the IMLA nor the regulations that the Secretary has promulgated to give content to her powers and duties under that Act establish any specific duties governing the Secretary's approval of a lease or lease amendment, except to the extent that they establish a minimum royalty rate for coal leases (now set at the minimum rate for federal coal leases). 25 C.F.R. 211.15(c) (1985 & 1987); 25 C.F.R. 211.43(b) (2001); see Pet. 3 & n.1. The lease amendments at issue in this case met, and exceeded, the applicable minimum rate at the time that the amendments were approved in 1987. There is no further requirement in the IMLA or the regulations that the Secretary insist that parties to a proposed Indian mineral lease agree to a higher rate under particular circumstances, and such a requirement would be inconsistent with the central aim of the IMLA —to allow *Indian mineral owners* to negotiate their *own* lease terms, subject only to a backstop protection of approval by the Secretary. See Pet. App. 68a.[14]

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[13] Even if the IMLA did impose a duty on the Secretary to act in the best interests of Indian mineral lease owners, that would not automatically lead to the conclusion that a breach of such a vague and generalized duty would give rise to a claim for money damages. In *Mitchell I*, this Court held that the Indian plaintiffs failed to state a claim for money damages even though the statute in that case, the General Allotment Act, expressly obligated the United States to hold allotments "in trust for the sole use and benefit of [Indian allotees]." 445 U.S. at 541.

[14] The Tribe asserts (Br. in Opp. 20) that the Secretary also violated 25 C.F.R. 211.2 (1985). In pertinent part, that provision authorizes the negotiation of Indian mineral leases, and reserves to the Secretary the right "to direct that negotiated leases be rejected." *Ibid.* It also provides that negotiated leases shall be filed with the Indian agency after 30 days, unless that time is extended by the Area Director. The court of appeals did not rely on, much less find a violation of, Section 211.2. In any event, nothing about Section 211.2 lends itself to an interpretation that would mandate the payment of compensation for a violation. See also Pet. App. 26a-27a n.5 (Schall, J., concurring in part and dissenting in part).

The Tribe asserts (Br. in Opp. 6) that "[t]he process required by IMLA for Secretarial approval * * * requires an economic analysis [of a mineral lease] to determine if it were in the Tribe's best interest." But the Tribe does not cite any statute or regulation requiring such an analysis. Moreover, while the Secretary may choose to conduct her own economic analysis in deciding whether to approve a lease, judicial imposition of an economic-analysis requirement would be inconsistent with the statute's focus on permitting Indian mineral owners to negotiate their own rates, subject to the minimum rate. Requiring the Secretary to conduct her own economic analysis of every Indian mineral lease submitted for her approval would always require the Secretary to substitute her own judgment for that of the Indian mineral owner, and all but render the lease negotiations between the Indian mineral owner and private parties a technical formality.

4. The court of appeals made no effort to tie the alleged breaches of trust even to generalized duties imposed by the IMLA and the Secretary's regulations under that Act. In finding the breach of a fiduciary duty mandating damages, the court of appeals focused on the Secretary's actions in 1985 in connection with Peabody's administrative appeal of a decision that the parties later agreed to vacate (see Pet. App. 11a-12a), rather than the reasonableness of the royalty rate and

the full package of lease amendments that were actually agreed to by the parties and approved by the Secretary in 1987. The Secretary's actions with respect to the pending administrative appeal were governed by the Department's general procedural rules and the APA, which plainly do not authorize the payment of damages for a violation, and not by the IMLA provision (25 U.S.C. 396a) governing approval of Indian mineral leases or amendments. See pp. 29-31, *supra*. Moreover, the Tribe itself does not seek to set aside the lease amendments to which it agreed in 1987 because, as the Tribe recognized below, "there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation." Pet. App. 50a.

C. Federal Involvement With Respect To Indian Mineral Leasing Does Not In Itself Subject The United States To The Tribe's Damages Claims

Instead of determining whether there was a violation of a specific statutory or regulatory provision that mandated the payment of damages for a violation, the court of appeals reasoned that the IMLA and the Secretary's implementing regulations gave the Secretary "control" over the management of the Indian resources at issue, and that the existence of such control gave rise to a duty on the part of the United States to manage those resources, which, if breached, would give rise to a claim for damages. See Pet. App. 5a; see also *id.* at 8a ("The [IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II*, insofar as federal authority is retained."). That understanding of *Mitchell II* is fundamentally flawed and, if adopted, would vitiate the fundamental principles of sovereign immunity that govern this case.

1. To begin with, the degree of federal control present in *Mitchell II* with respect to timber management

on Indian lands was much greater than the degree of any control exercised by the Secretary with respect to coal leases. In *Mitchell II*, this Court went to great lengths to describe the "pervasive" control that the United States had expressly assumed with respect to Indian timber sales. 463 U.S. at 219; see *id.* at 220 ("regulations address[] virtually every aspect of forest management"); *id.* at 222 (statutes establish "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber"); *id.* at 225 (government has "assume[d] such elaborate control over forests and property belonging to Indians"); *id.* at 225 n.29 (discussing "pervasive federal control" in Indian timber management). As the Court of Federal Claims explained, "the level of management and control that the government has assumed over coal leases under IMLA" does not come close to the level of federal control that this Court identified in *Mitchell II*. See Pet. App. 54a; see also *id.* at 55a-59a.

In the IMLA, the United States has assumed certain fiduciary responsibilities with respect to the leasing of minerals on Indian lands, but that Act "does not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of [leased] lands." *Mitchell I*, 445 U.S. at 542 (emphasis added). To the contrary, the key provision of that Act transferred leasing authority from the Secretary *to the Tribes*. It provides that tribal lands "may, with the approval of the Secretary * * * , be leased for mining purposes, *by authority of the tribal council or other authorized spokesmen*." 25 U.S.C. 396a (emphasis added). Moreover, as the Court of Federal Claims explained, that provision squares with an important purpose of the IMLA—"to foster Indian self-determination," an "ideal" that is "directly at odds"

with the notion that the Secretary has full "*control* over leasing." Pet. App. 58a-59a; see *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981), amended, 665 F.2d 1390 (The IMLA gave "tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary."), cert. denied, 459 U.S. 916 (1982).[15]

To be sure, another purpose of the IMLA is to see that Indian Tribes receive "a profitable source of revenue" from the leasing of mineral resources on their lands. *Cotton Petroleum Corp.*, 490 U.S. at 179. That conclusion is supported by the legislative history of the IMLA, which states in part: "It is not believed that the present law is adequate to give the Indians the greatest return from their property." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938). But as this Court admonished in *Cotton Petroleum Corp.*, 490 U.S. at 179, that statement cannot be given "talismanic effect." Even when

[15] See *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation* v. *Board of Oil & Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (noting that one of the purposes of IMLA was "to increase Indian authority in granting leases"); *BHP Minerals Int'l Inc.*, 139 Interior Bd. Land Appeals 269, 311 (1997) ("[W]hile maximization of tribal revenues was clearly one purpose behind * * * the IMLA * * * [e]qually important was the desire to give Indians a greater say in the use and disposition of the resources found on Indian lands.") (citing *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 177-180 (1989)). That purpose is promoted by the IMLA. As this Court recognized in *Cotton Petroleum Corp.*, the legislative history of the IMLA makes clear that the statute was intended to make it *easier* for Tribes to engage in—and profit from—mineral leasing by eliminating obstacles placed on such leasing that did not apply to non-Indians. See *id.* at 179.

"[r]ead in the broadest terms possible," the relevant paragraph in the committee report merely "suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Ibid.* (quoting committee report).

The legislative history thus does not suggest that a Tribe has a right to renegotiate a lease—or to sue the United States—any time that it believes in retrospect that it did not receive the greatest possible return for its resources. Nor does it obligate the Secretary to second guess or disapprove leases that already have been negotiated and agreed to by a Tribe and a lessee on the ground that, in the Secretary's view, the royalty rate and other conditions agreed to by the parties would not maximize the Tribe's profits, or that an alternative set of lease terms would be more in the interest of the Tribe. The IMLA authorizes the Tribes to negotiate mineral leases with others. The Act's requirement of approval by the Secretary furnishes a general backstop protection, not a duty on the part of the Secretary independently to determine and impose on the parties the terms that she believes will maximize the return for one side of the negotiated transaction.

As discussed above, in *Mitchell I*, the General Allotment Act explicitly obligated the United States to act for the "*sole* * * * benefit" of the Indians, but the Court nonetheless concluded that it did not give rise to an obligation on the part of the United States that, if breached, would mandate the payment of damages. 445 U.S. at 541 (emphasis added). In the same vein, to the extent that the IMLA generally implies or contemplates that the Secretary will act for the benefit of Indian Tribes, or in the interests of Tribes, the existence of such a generalized duty does not in itself

authorize a damages action against the United States under the Tucker Act based on a claim that the Secretary erred in some particular way in implementing the IMLA.[16]

2. In any event, in *Mitchell II* this Court did not focus on the existence of federal control with respect to Indian resources *vel non*. Instead, in addition to pointing to the existence of a "pervasive" regulatory scheme, the Court emphasized that the government had specifically assumed "fiduciary *management* duties" with respect to Indian timber resources. 463 U.S. at 218 (emphasis added); see *id.* at 222 ("emphasizing the Secretary of the Interior's management duties" with respect to timber on Indian trust lands). For example, one statute in *Mitchell II* expressly provided that "[s]ales of timber 'shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs.'" *Id.* at 209 (citation omitted); see *id.* at 224. In addition, Congress mandated that, "[i]n performing this duty, the Secretary was specifically required to take

[16] The court of appeals relied on "the interests of the Indians" language in 25 U.S.C. 399 as evidence that IMLA "place[s] on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." Pet. App. 11a. But Section 399 is not a part of *the IMLA*. Section 399 was enacted almost 20 years before the IMLA, and authorized the Secretary to lease certain unallotted Indian lands for mining purposes under terms set by the Secretary, *without* input from the Indian tribes. The legislative history of the IMLA specifically notes that the Act was intended to correct Section 399's deficiencies, including with respect to the *lack* of control by Indian Tribes over the leasing of their mineral resources. S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, *supra*, at 2. In any event, even if Section 399 *were* a part of the IMLA, its reference to the interests of the Indians would not compel the conclusion here, any more than in *Mitchell I*, that the United States has breached a money-mandating duty owed to the plaintiff Tribe.

into account" several different factors, including "the highest and best use of the land" and the "present and future financial needs of the owner and his heirs." *Id.* at 222 (quoting 25 U.S.C. 406(a)); see *id.* at 220-221 (Congress imposed "strict[] duties upon the Government with respect to Indian timber management," including by "expressly direct[ing] that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'").

Congress has not imposed any comparable "fiduciary management duties" on the Secretary with respect to Indian coal leases. When the Secretary approves a lease (or an amendment to an existing lease), the IMLA and implementing regulations neither mandate that she establish a particular royalty rate or other terms, nor impose any specific standards that the Secretary must assure are satisfied before giving her approval. For example, the regulations that applied when Peabody filed its appeal in 1985 and the Secretary approved the lease amendments in 1987 provided only that the Secretary could not approve a lease with a minimum royalty rate of *less* than "10 cents per ton." 25 C.F.R. 211.17(c) (1985 & 1987).

The current regulations have increased the minimum royalty rate to 12 1/2 percent of gross proceeds—the rate that applies to coal leases on federal lands—and state that "[a] *lower* royalty rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b) (emphasis added). The regulations do not refer to the Secretary's approval of a rate that is at least equal to the minimum 12 1/2 percent rate, much less require the Secretary to insist that the parties to a negotiation agree to a higher rate under particular circumstances. In other words, the structure of even the current regulations underscores

that the United States has *not* assumed any specific management duties with respect to the approval of a lease that contains a royalty rate at least equal to the minimum rate. See 56 Fed. Reg. 58,734, 58,736 (1991) (minimum royalty rate regulation provides "reasonable royalty rates").

D. The Common Law Of Trusts Does Not Supply A Right To Recover Damages Against The United States Under The Tucker Act

The court of appeals also erred in treating the United States as if it were a private trustee that may be liable in money damages to an Indian Tribe for breach of any of the common law duties cited by the court that might be applicable to a private trustee. See Pet. App. 11a-13a. As the Court of Federal Claims explained, the violations of the common law duties that it found "do not themselves confer jurisdiction on this Court, nor entitle [the Tribe] to money damages." *Id.* at 52a. That conclusion is compelled by the text of the Tucker Act, which, as explained above, requires a plaintiff to point to the violation of an "Act of Congress," or a "regulation of an executive department." 28 U.S.C. 1491(a)(1). Likewise, the court of appeals' reliance on the common law conflicts with this Court's focus in *Mitchell II* on whether the *statutes or regulations* at issue could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added).

This Court has recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee who is governing by common law standards. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). The United States indeed occupies a unique relationship with the Indian Tribes, which has been

characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however, give rise to legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for damages against the United States.

In determining whether an alleged error by the Secretary under a statute or regulation involving Indian affairs may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986); *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). The Indian Tucker Act, moreover, requires that the claims of Indian plaintiffs be placed on the *same* footing as the claims of non-Indian plaintiffs. See p. 22, *supra*. To the extent that the court of appeals held that the United States may be liable for damages based on application of common law trust principles, its decision puts the damages claims of Indian plaintiffs in a considerably different position than the damages claims of non-Indian plaintiffs, which must be squarely grounded on an "Act of Congress" or "regulation of an executive department." 28 U.S.C. 1491(a)(1).[17]

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[17] The Tucker Act states that, *inter alia*, the Court of Federal Claims has jurisdiction to entertain claims against the United States based on the Constitution, an Act of Congress or implementing regulation, or a contract with the United States. See 28

At the same time, the court of appeals' decision would impose a regime that is at odds with the central goal of tribal self-determination. That goal is embodied in the text of the IMLA itself, which assigns to the Tribe, not the Secretary, the power and responsibility to lease tribal lands, subject only to the approval of the Secretary and compliance with specific standards set forth in the IMLA and the Secretary's implementing regulations. That goal also is reflected in one of the basic purposes of the IMLA, which was to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985), the cornerstone of modern Indian policy designed to facilitate tribal self-determination by "giv[ing] the Indians the control of their own affairs and of their own property," *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting 78 Cong. Rec. 11,125 (1934) (Rep. Howard)). And the tribal self-determination goal is confirmed by more recent legislation, such as the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450.

The court of appeals' decision, however, in effect would require the Secretary to look behind and second-guess the wisdom of virtually any minerals agreement negotiated by an Indian Tribe and a private party, applying vague and even conflicting concepts of the common law that might be enforced by a court of equity against a private trustee. Not only would such a practice undermine the independence and sovereignty

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U.S.C. 1491(a)(1). Congress could have added to the list a provision for claims based on a trust relationship with the United States. But it did not do so in either the Tucker Act or the Indian Tucker Act. See *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 (2002) ("expressing one item of [an] associated group or series excludes another left unmentioned").

of Tribes. It also would interfere with the role of Congress, which has plenary power to legislate in the field of Indian affairs, *United States* v. *Kagama*, 118 U.S. 375 (1886), and thereby to prescribe the powers and duties of the Secretary with respect to tribal resources. In the circumstances presented here, Congress clearly has spoken, giving tribal governments control over their mineral leasing decisions, with the Secretary furnishing a general backstop protection to assure that the minimum standards prescribed by the IMLA or the Secretary's implementing regulations are met, rather than serving as an independent negotiator of lease terms that she believes would be more favorable, or more in the Tribe's interests. And Congress has assigned to the Secretary, rather than to courts considering damages claims, the authority to flesh out the manner in which the Secretary will perform functions that Congress has retained for her. See 25 U.S.C. 396d (authority to issue regulations).

Finally, to hold that the United States may be liable in damages for the violation of any duty discoverable in the interstices of the law of trusts would vastly expand the potential liability of the United States for breach of trust, not to mention conflict with bedrock principles of sovereign immunity discussed above. And it would leave federal officials without any clear principles to follow—which specific statutory and regulatory duties supply—in seeking to avoid the imposition of damages claims. Nothing in this Court's sovereign immunity jurisprudence in general or its *Mitchell* decisions in particular supports the court of appeals' decision to go down that path, and thus transform the Court of Federal Claims into a court of equity, in which the United States may be found liable in damages for alleged violations of common law duties that have not

been assumed by the government in any statute or implementing regulation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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